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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-198575 **DATE:** August 11, 1981

MATTER OF: Earle W. Cook - Compensation for Services Prior to Appointment

DIGEST:

1. Former Energy Research and Development Administration consultant who performed services for Department of Energy at request of agency officials before appointment was renewed may be compensated for reasonable value of services since he served as a de facto employee performing duties in good faith under color of authority.

2. Although Federal Travel Regulations permit agencies to prescribe per diem allowance under certain conditions for travel to high-rate geographical areas, DOE consultant is entitled only to actual expense reimbursement rather than per diem reimbursement for travel when orders do not authorize per diem.

3. Consultant is entitled to subsistence reimbursement even on days when he was in travel status for 10 hours or less to high-rate geographical area (HRGA) since travel was performed prior to issuance of 58 Comp. Gen. 810 (1979), which held that 10-hour rule applied to HRGA. In Nicholas M. Veneziano, B-194197, December 24, 1980, this rule was held to apply prospectively only.

This decision is in response to a request from the former Director of the Office of Finance and Accounting, Department of Energy (DOE), for our determination concerning Mr. Earle W. Cook's entitlement to compensation for consulting services he performed prior to his appointment on December 12, 1977. Also at issue is Mr. Cook's entitlement to reimbursement for travel expenses he incurred in connection with his consulting services.

Mr. Cook served as an intermittent consultant for the Energy Research and Development Administration (ERDA) under an appointment, dated November 23, 1976, covering the period from October 1, 1976, to September 30, 1977. On October 1, 1977,

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ERDA became a part of DOE. On September 12, 1977, a request for renewal of Mr.Cook's appointment as of October 1, 1977, was submitted to the Personnel Division. The Personnel Division returned the request on September 26, 1977, because it did not conform with new DOE guidelines. It was resubmitted on October 21, 1977, but Mr. Cook's renewal appointment was not made effective until December 12, 1977.

During the period of October 1, 1977, to December 12, 1977, Mr. Cook continued to provide services at the request of the Director of the City and County Relations Division, Intergovernmental and Institutional Relations, with the understanding that his appointment would be made retroactive. Mr. Cook was asked to serve despite the fact that the Executive Resources Management Division advised Intergovernmental and Institutional Relations in an October 6, 1977, phone conversation that former ERDA consultants, not under executed contracts on October 1, 1977, should not continue to work until their new appointments were effected. In addition, the Director of Personnel issued a memorandum on October 28, 1977, in which he stated that consultants were not to be entered on duty until the request was approved by the Director of Administration. Apparently Mr. Cook was permitted to continue work due to confusion concerning his actual status. He performed 25 days of service before his new appointment became effective and is claiming $4,000 in pay for those days at the rate of $160 per day.

Mr. Cook's appointment may not be made retroactive since it does not appear that a clerical or administrative error occurred which (1) prevented the personnel action from taking effect as originally intended (2) deprived Mr. Cook of a right granted by statute or regulation, or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy if not adjusted retroactively. See 54 Comp. Gen. 888 (1975).

Even though an employee may not be retroactively appointed, he may be compensated for the reasonable value of his services if he is found to have served in good faith as a de facto employee. It appears that Mr. Cook falls within our definition of a de facto employee as one who performs the duties of an office or position with apparent right and under color of an appointment and claim of title to such office or position. Furthermore, it appears that he served in

good faith, with the expectation of compensation, and without knowledge that his appointment could not be made retroactive.

In William Devine, Jr., B-196940, December 29, 1980, we were faced with a nearly identical situation. Mr. Devine was a consultant with ERDA whose appointment expired on September 30, 1977. He continued to work at the request of the Director of the Uranium Resources and Enrichment Division. On October 21, 1977, the Personnel Division apparently notified both the Division of Uranium Resources and Mr. Devine that DOE could not retroactively appoint consultants and, therefore, Mr. Devine should not be working. We held that Mr. Devine qualified as a de facto employee but was entitled to compensation only to the date he was notified that he should not be working without an appointment. In the present situation, however, there is no indication that Mr. Cook knew during the time he was working prior to the date his appointment was renewed, that the appointment could not be made retroactively effective.

We hold that Mr. Cook was a de facto employee serving in good faith from October 1, 1977, to December 12, 1977, and, therefore, may be compensated for the services he rendered during that time.

However, it should be noted that Mr. Cook has claimed a total of $4,000 in compensation, 25 days at a rate of $160 per day. His prior appointment as an ERDA consultant indicated a deduction should be made for his Civil Service Retirement Fund annuity. We also note that several of the days worked by Mr. Cook in early October 1977 were prior to the effective date of the yearly pay comparability adjustment under 5 U.S.C. §§ 5301 et. seq. In determining the exact amount of compensation due Mr. Cook, care should be taken to ensure that the daily rate paid does not exceed the rate allowable prior to the comparability pay adjustment, and that an appropriate deduction is made for Mr. Cook's civil service annuity.

In connection with his consulting services Mr. Cook traveled from his home in Culpepper, Virginia, to either Washington, D.C., or Germantown, Maryland, on 16 occasions. He has requested reimbursement for the costs of this travel in the amount of $598.65. The majority of that amount is attributable to mileage and taxicab fares which DOE does not

contest. Mr. Cook is also claiming 1/2 day of per diem for each of the days he traveled. DOE has asked whether Mr. Cook should be reimbursed on a per diem or actual expense basis and whether he is entitled any subsistence reimbursement for those days when his travel is less than 10-hours.

Mr. Cook's duty points were in the Washington high-rate geographical area (HRGA). Effective May 19, 1975, the Federal Travel Regulations (FTR) were amended to require reimbursement on an actual expenses basis for travel to designated high-rate geographical areas. Federal Property Management Regulations (FPMR), Temporary Regulation A-11, May 19, 1975. Effective July 1, 1975, the FTR was amended (para. 1-8.1b (1)) to authorize agencies to prescribe a per diem allowance under certain conditions for travel to an HRGA. FPMR, Temp. Reg. A-11, Supp. 1, June 27, 1975, Attachment A. DOE has stated that it believes only Mr. Cook's actual expenses may be considered for reimbursement because his travel orders do not indicate that per diem is to be paid. It appears that Mr. Cook's travel orders authorized actual subsistence expenses. Therefore, he may be reimbursed only for those items of expense which he itemizes in accordance with FTR paragraph 1-8.5.

Mr. Cook may be reimbursed for such expenses even on those days when he was in travel status for 10-hours or less. In Nicholas M. Veneziano, B-194197, December 24, 1980, 60 Comp. Gen. ___, which was a reconsideration of our earlier decision Nicholas M. Veneziano, 58 Comp. Gen. 810 (1979), we reaffirmed our determination that subsistence expenses may not be paid for travel of 10 hours or less to high-rate geographical areas. However, because we were informed that a number of agencies had interpreted our decision Rolf Mowatt-Larssen, B-184489, April 16, 1976, as prohibiting the extension of the 10-hour rule to travel to high-rate geographical areas, we decided in B-194197, December 24, 1980, not to make our decision to the contrary in 58 Comp. Gen. 810, apply to travel performed before or on its date of issuance - September 27, 1979.

Milton J. Socolar

Acting Comptroller General
of the United States